UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
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DEPARTMENT OF STATE
COASTAL PROGRAMS

MAY 05 2000

RECEIVED

Lt. Colonel Mark D. Feierstein
District Engineer
Department of the Army
1776 Niagara Street
Buffalo, New York 14207

Dear Lt. Colonel Feierstein:

This letter is in response to an application by Millennium Pipeline Company, LP (Millennium) for a permit to install structures and to discharge fill into waters of the US. The stated purpose is to construct an underground pipeline for conveying natural gas for commercial sale. The project is proposed to run from Lake Erie at the border between the United States and Canada and subsequently to extend south to Mount Vernon, Westchester County, New York. Our assessment of the available information indicates that construction of the proposed design would have substantial and unacceptable impacts on aquatic resources. As a consequence, we recommend that authorization be denied.

Proposed Action:
A project description for the proposed activities is provided in a Public Notice advertized jointly by the U.S. Army Corps of Engineer (ACOE) Districts in Buffalo, New York and Pittsburgh under processing numbers 97-320-0003(2), 1999-00640, and 199701186, respectively. If constructed as presently proposed, the pipeline would begin at the US-Canada border at an interconnection with TransCanada Pipelines, LTD. in Lake Erie to landfall near Ripley, Chautauqua County, New York. The route would then continue across 11 southern New York counties (Chautauqua, Cattaraugus, Alleghany, Steuben, Chemung, Tioga, Broome, Delaware, Sullivan, Orange, and Rockland) to the west bank of the Hudson River at the Town of Haverstraw; cross Haverstraw Bay; make landfall at the Town of Cortland; and terminate at Mount Vernon, Westchester County, New York.

According to the Public Notice, a 36-inch mainline is proposed for 373 miles between the US-Canada border to Ramapo, New York. The remaining 44 miles have been proposed as a 24-inch mainline between Ramapo and Mount Vernon, New York. Meter stations and block valves would be constructed at several locations along the pipeline. The applicant would acquire existing pipeline facilities from the Columbia Gas Transmission Corporation and operate them as part of the new pipeline system (this would include seven miles of 24-inch diameter pipeline between Ramapo and Clarkstown, New York that would be used for the new mainline system), and various laterals and appurtenant aboveground facilities in New York and Pennsylvania. Approximately 86 percent of the on-land pipeline would be constructed in or adjacent to existing right-of-way (ROW). Typical construction would occupy a 75-foot ROW and as much as a 200-

foot-wide ROW at certain stream crossings. Millennium has proposed hiring an environmental inspector for assuring that construction activities are performed in accordance with environmental conditions of the Construction Alignment Sheet and the Environmental Construction Standards. If the project is permitted, we suggest an independent inspector who reports to the state and federal regulatory agencies would be preferred to avoid potential conflicts of interest.

Project Setting and Impacts:
The proposed alignment for this project traverses a variety of ecological settings ranging from upland to lacustrine, palustrine, riverine, and estuarine systems. These areas are held in a variety of private and public uses including open water, forest, wetlands, and tracts used for agricultural, residential, commercial, and industrial purposes. The applicant has indicated that a total of 296 perennial and 195 intermittent waterbodies would be crossed and estimated that 422 acres of wetlands would be disturbed during construction.

Wetlands: Along the pipeline alignment, the applicants generally propose to create a 75-foot-wide construction ROW, with additional width required in agricultural land and at stream, wetland, road, and railroad crossings. Typically, a 50-foot ROW would be maintained post construction for the life of the project. While a portion of the cleared area is proposed to be restored to existing wetland community types, other parts of the ROW would be converted and maintained to different habitat types. We note that these changes would result in *permanent* impacts to wetland values and functions and that Millennium has not proposed any compensatory mitigation for these impacts. Given the hundreds of acres that potentially would be affected by the proposed construction activities, it is important that 1) sensitive habitats be avoided to the fullest extent practicable, and 2) project routing and design ensure that appropriate wetland values and functions are maintained. For projects of this nature, mitigation may not be able to be provided on site. As a general rule, any mitigation developed for this project should be undertaken in the same watershed as close as feasible to the impacted area and designed to replace the functions and values of those lost or impaired as a consequence of the construction activity. The State and Federal resource agencies should be consulted to evaluate mitigation projects developed for this purpose.

In addition, field verification is necessary to clarify the extent and nature of wetland impacts. Unfortunately, the ACOE has not verified the delineation for these wetlands and made a final determination of the proposed impacts. Without an accurate delineation and final determination of the amount, location, and type of wetlands that would be impacted by project construction, it is not possible for the ACOE or involved resource agencies to ensure that our mutual responsibilities under the Clean Water Act have been met with the present project design. Along these lines, we make reference to the US Environmental Protection Agency's recent correspondence to you (dated March 30, 2000) which 1) questioned whether wetland impacts have been adequately avoided and minimized for the present proposal, and 2) concluded that the proposed project "...failed to demonstrate compliance with the Clean Water Act Section 404(b)(1) Guidelines..." and would "...have a substantial and unacceptable impact on aquatic resources of national importance." We

share their concern on this issue and raise downstream impacts to water quality and aquatic life as a fundamental matter to be resolved before a final permit decision is made.

In addition to generic wetland considerations, we would like to present critical issues that arose when we first became aware of the Millennium proposal. Despite discussions and negotiations among the applicant and involved agencies in various forums, these significant concerns remain to be resolved.

Hudson River Crossing: The Public Notice describes a proposed crossing with a 24-inch diameter pipeline from Bowline Point in Haverstraw, Rockland County to the Veterans' Administration Hospital in Cortland, Westchester County, New York. This crossing is proposed in the Haverstraw Bay reach of the Hudson River. The distance of the proposed crossing is approximately 2.2 miles. The applicant has previously certified that the use of horizontal directional drilling techniques that might otherwise avoid significant ecological impacts is not technically feasible. Instead, the applicant proposes to bury the pipeline within a trench excavated in the river bottom and banks. A lay barge crossing method would be used to assemble and place the pipe. Material dredged to form the trench would be stored on barges and is proposed as subsequent backfill. Based upon our experience with subaqueous crossings for other pipeline projects in the Hudson River region and elsewhere, we expect that project construction would physically modify and significantly impair the Haverstraw Bay habitat. This would occur to the detriment of aquatic resources, including estuarine-dependent fisheries.

Haverstraw Bay is a productive estuary that provides regionally significant ecological values and functions for many species of concern, notably anadromous, estuarine, and certain marine species which use and are dependent upon Haverstraw Bay for spawning, nursery, feeding, and overwintering activities. This productive estuary area has been designated as a Significant Habitat of the New York Bight Watershed by the US Fish and Wildlife Service due to the regional significance of the ecological values it provides to fish, invertebrates, and other living resources. In particular, striped bass (*Morone saxatilis*), American shad (*Alosa sapidissima*), Atlantic tomcod (*Microgadus tomcod*), white perch (*Morone americana*), Atlantic sturgeon (*Acipenser oxyrhinchus*), bay anchovy (*Anchoa mitchilli*), shortnose sturgeon (*Acipenser brevirostrum*), blue crab (*Callinectes sapidus*), and bluefish (*Pomatomus saltatrix*) are among the biota of concern that use Haverstraw Bay extensively for essential ecological uses. These resources are managed under a variety of federal legislative actions, including the Fish and Wildlife Coordination Act, the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), the Emergency Striped Bass Act, the Coastal Zone Management Act, and the Endangered Species Act (ESA).

Habitat use of the Haverstraw Bay reach of the Hudson River by species of concern is extensive and complex. From December through March of any year, the Bay area is relatively quiet except for Atlantic tomcod reproductive activity. In addition to the most sensitive tomcod life stages, the habitat supports concentrated use by species such as striped bass, shortnose sturgeon, and Atlantic sturgeon for overwintering. The physiological demands of overwintering render fish extremely susceptible to habitat disturbances. Construction activities such as those proposed for

the Hudson River crossing would create a direct loss of habitat for these species and subject them to increased mortality.

In the April through July period, spawning adults of many different genera move into Haverstraw Bay, with non-motile eggs and embryos being deposited and pelagic larvae occurring in increasing numbers as the season progresses. Accordingly, physical and chemical impacts related to construction would constitute a progressive increase of impacts to highly sensitive age groups. In the summer (July through September), physical disturbances to the habitat and forage base would affect key food chain relationships, influence dissolved oxygen levels, and otherwise reduce the ecological ability of the habitat to support species of concern through their recovery period.

The September through mid-November time frame seems to be the least ecologically sensitive period since the fish assemblage tends to be more motile and capable of avoidance behaviors that reduce their risk of harm. Therefore, until water temperatures reach the critical threshold that initiates overwintering behaviors, these biota would be less likely to suffer significant mortality caused by physical disturbances. However, they would experience some level of impairment in terms of access to their forage base and perhaps for shelter opportunities.

As indicated above, direct construction impacts would be unacceptable for much of the year. At the request of the Federal Energy Regulatory Commission, we recently identified that construction activities that meet other regulatory considerations could be permitted in Haverstraw Bay between September and mid-November, provided that mitigative measures identified during the permitting process were in place. However, until such mitigative measures are in place, we continue to recommend that the activity be avoided in Haverstraw Bay altogether.

Haverstraw Bay also has been acknowledged by the New York Coastal Management Program (NYCMP) as one of the most important fish and wildlife habitats in the Hudson River Estuary. This special status is formally recognized by New York's designation of the area as a Significant Coastal Fish and Wildlife Habitat pursuant through New York State Law and the Federal Coastal Zone Management Act. The National Oceanic and Atmospheric Administration (NOAA) concurs with this designation. The New York Coastal Fish and Wildlife rating form and narrative for the state designation of the Haverstraw Bay habitat details the basis for this designation and includes the NYCMP's conclusion that this habitat is irreplaceable. We concur with the NYCMP analysis and findings.

The narrative for the Haverstraw Bay significant coastal fish and wildlife habitat also provides that: "Any physical modification of the habitat or adjacent wetlands, through dredging, filling or bulkheading, would result in a direct loss of valuable habitat area." New dredging does not meet the habitat impairment test criteria established by the NYCMP for this site and we cannot support the selected pipeline alignment and installation technique because it would produce unacceptable and avoidable impacts to aquatic resources, including endangered and other special concern species. As we have indicated on previous occasions, an out-of-Bay, less damaging alignment should be pursued if a crossing of the Hudson River is necessary or appropriate. We are

prepared to evaluate such alternative proposals for crossings outside of the Haverstraw Bay habitat that the project proponents find technically feasible.

ENDANGERED SPECIES ACT CONSIDERATIONS:

The endangered shortnose sturgeon (*Acipenser brevirostrum*) is the only endangered species under the jurisdiction of this agency that occurs in the project region. Shortnose sturgeon may be found in the Hudson River between the George Washington Bridge in Manhattan and the Federal Lock and Dam in Troy, New York.

Federal action agencies must consult with NMFS under Section 7 of the ESA about any action they authorize, fund, or carry out that may affect a listed species. The ESA further provides that, in consultation with NMFS, the federal action agency shall use its authority to further the purposes of the ESA to facilitate conservation and recovery of listed species and the ecosystems upon which they depend. During the consultation, "effects of the action" must be considered, including "...direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action...." Since shortnose sturgeon occur in the project vicinity, consultation pursuant to Section 7 of the ESA is necessary. We note that the issue of "take" as defined by the ESA is a critical issue that must be addressed in this situation. Since both the FERC and the ACOE are action agencies in this matter, you may choose to produce a joint biological assessment for this project. We would appreciate notification from your agency as to whether you will do so.

In addition to federally listed species, we note that Atlantic sturgeon (*Acipenser oxyrhinchus*), an anadromous fish that occurs in the Hudson River, is a candidate species that could be listed under the ESA in the future. Candidate species receive no mandatory federal protection; however, NMFS encourages Federal action agencies and others to protect these species. We will notify you if the status of this species changes before a final permit decision is reached in the event that additional coordination such as an ESA Section 7 conference (50 CFR § 402.10) for this species will be necessary.

ESSENTIAL FISH HABITAT CONSIDERATIONS:

Pursuant to Section 305(b)(2) of the MSFCMA, federal agencies are required to consult with NMFS regarding any action they authorize, fund, or undertake that may adversely affect Essential Fish Habitat (EFH). An adverse effect has been defined by the Act as follows: "Any impact which reduces the quality and/or quantity of EFH. Adverse effects may include direct (*e.g.*, contamination or physical disruption), indirect (*e.g.*, loss of prey, reduction in species' fecundity), site-specific, or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions."

The Hudson River crossing for this proposal may adversely affect EFH, particularly in Haverstraw Bay. Pursuant to the MSFCMA, the ACOE must consult with NMFS on this project, beginning with a written assessment of the effects of this project on EFH. Mandatory components of an EFH assessment include the following:

A detailed description of the proposed action

2. An analysis of the effects, including direct, indirect, and cumulative effects of the proposed action on EFH, the managed species, and associated species such as prey species, including affected life history stages

3. The Federal Agency's views regarding the effects of the action on EFH

4. Proposed mitigation, if applicable

Other information that should be incorporated into an EFH assessment, as appropriate, includes the results of on-site inspections to evaluate the habitat, the site-specific effects of the project, the views of recognized experts on the habitat or species affects, a review of the pertinent literature and related information, and an analysis of alternatives to the proposed action. Pursuant to Section 305(b)(4)(A) of the MSFCMA, NMFS will review the EFH assessment and provide the federal action agency with comments and EFH conservation recommendations as appropriate. Such recommendations may include measures to avoid, minimize, mitigate, or otherwise offset adverse impacts to EFH.

Additional information about EFH and the requirements of the MSFCMA can be found at our website at: http://www.nero.nmfs.gov/ro/doc/hcd.htm

Conclusion:
Thank you for considering these important issues. As indicated above, we are very concerned about the impacts that the present design will have on aquatic resources, including special concern species, harvested resources, forage species, and habitats. Constructing the present design for this project would incur an unacceptably high environmental cost and we must conclude that authorization will result in substantial and unacceptable impacts to aquatic resources of national importance. Accordingly, we recommend that your office not issue the permit. This letter is in accordance with Part IV, Paragraph 3(b) of the 1992 Clean Water Act Section 404(q) Memorandum of Agreement between our agencies.

As always, my staff is available to discuss these issues as your public interest review continues and the upcoming ESA and EFH consultations or other pertinent information are provided to assist in that review. We would especially appreciate your keeping us informed of the status of key project elements such as the wetland jurisdictional determination, development of a mitigation plan, and the Hudson River crossing so we can continue to participate in the pertinent discussions, negotiations, and consultations. Should you have any questions or wish to discuss this matter further, please contact Diane Rusanowsky at 203/579-7004.

Sincerely,

Patricia A. Kurkul
Regional Administrator

cc:	USACOE	Buffalo (M. Crawford)
	USACOE	Albany Field Office (H. Firstencel)
	FERC	Washington, DC
	F/NER4	Milford, Sandy Hook
	F/NER3	Gloucester
	USF&WS	Cortland
	USEPA	Region 2
	NYSDOS	Albany

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